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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-209196, B-208 9252 **DATE:** April 5, 1983

MATTER OF: Association of Soil and Foundation
Engineers

DIGEST:

GAO will not question a contracting agency's determination to secure services through competitive bidding procedures rather than through the procedures prescribed in the Brooks Act for the selection of architectural or engineering firms unless the protester demonstrates that the agency clearly intended to circumvent the Act.

The Association of Soil and Foundation Engineers (ASFE) protests use of standard competitive procedures under invitation for bids (IFB) No. FWS 6-82-046 issued by the Department of the Interior. ASFE additionally requests that we reconsider our decision Association of Soil and Foundation Engineers, B-208925, January 4, 1983, 83-1 CPD 8, in which we denied its protest under IFB No. K5120136, also issued by the Department of the Interior. ASFE contends that the services under both solicitations should have been secured through the special procedures prescribed in the Brooks Act, 40 U.S.C. § 541 et seq. (1976), for the procurement of architectural and engineering (A-E) services. The Brooks Act declares it to be Federal policy to issue public announcements of all requirements for A-E services and to negotiate contracts for the services on the basis of demonstrated competence and qualifications; the procedures do not include price competition. We deny the protest against solicitation FWS 6-82-046 and affirm our prior decision concerning solicitation K5120136.

Solicitation No. FWS-6-82-046 calls for the drilling of soil samples, the classification and laboratory analysis of the soil samples, and the submission of a report which details the results of the testing and recommends construction methods and

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foundation design for various structures and facilities at the Leadville Fish Hatchery, Leadville, Colorado. The preponderance of the contract work described in the solicitation involves the drilling, collection and laboratory analysis of soil samples which ASFE agrees do not constitute professional A-E services under the Brooks Act. Although professional A-E firms often perform these services, they are not unique to A-E firms. Rather, ASFE contends that the Brooks Act applies to the procurement essentially because the solicitation requires to be included in the report, in addition to test results and findings,

** * * recommendations for the type of foundations (piling, spread footings, etc.), site drainage recommendations, method of construction including soil bearing capacities and settlement predictions for the structure proposed."

In ASFE's view this aspect of the procurement is A-E in nature and, therefore, Brooks Act procedures should have been used to procure all the services contemplated by the solicitation.

Solicitation K5120136 uses standard competitive procedures to secure soil boring sampling and testing needed to provide the State of Ohio with recommendations about stabilizing a site known as the Weidemeyer earthslip. The majority of the contract work involves drilling, installation of piezometers and collecting soil and rock samples. Again, ASFE concedes that these efforts do not constitute professional A-E services under the Brooks Act, but asserts that those services may logically and justifiably be performed by an A-E firm. ASFE argues that the Brooks Act applies to the procurement because the solicitation also requires the contractor to submit,

** * * an engineering report which includes recommendations for priority repairs, recommendations for design load cases, and recommendations for soil design parameters for the various soil stratas encountered."

Again ASFE asserts these are A-E services and that the non-competitive procedures should have been used.

Even if we accept ASFE's assertion that recommending types of foundations and methods of construction constitute engineering services, we do not agree with ASFE that it

follows as a matter of logical necessity that Brooks Act procedures had to be used in the procurements. The reason is that the Brooks Act does not require that contracts be awarded to A-E firms merely because architects or engineers might do part of the contract work. See Association of Soil and Foundation Engineers--Reconsideration, 61 Comp. Gen. 377 (1982), 82-1 CPD 429. Rather, the Act's procedures, and the restriction to A-E firms attached to them, apply to the procurement of services which uniquely or to a substantial or dominant extent require performance by a professionally licensed and qualified A-E firm. Ninneman Engineering--Reconsideration, B-184770, March 9, 1977, 77-1 CPD 171.

The application of this standard is in certain cases not a matter of great difficulty and the applicability or nonapplicability of Brooks Act Procedures is clear. For example, design and consultation services secured in connection with a Federal construction project clearly are required to be performed by an A-E firm¹ and Brooks Act procedures must be used.² See Ninneman Engineering - Reconsideration, supra. Similarly, preliminary road

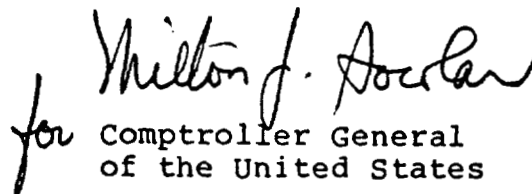
¹This is consistent with the stated purpose of the Brooks Act, that is, "to establish a Federal policy for the selection of qualified architects and engineers to design and provide consultant services in carrying out Federal construction and related programs." S. Rep. No. 1219, 92d Congress, reprinted in 1972 U.S. Code Cong. & Ad. News 4767. The rationale for the policy is that the quality of these services is basic and essential to the quality of construction, yet their cost generally represents a very small part of the total cost of construction. The act itself is not limited to construction.

²The Brooks Act requires negotiation on the basis of demonstrated competence and qualification for the type of professional services required, that is, without price competition, but at fair and reasonable prices. 40 U.S.C. 542. Costs will be kept under control by the 6 percent fee limitation prescribed by 41 U.S.C. 254(b). S. Rep. No. 1219, supra note 1, at 4772. The 6 percent fee limitation concerns A-E contracts relating to any public works or utility project, that is, projects concerning construction. 17 Comp. Gen. 545 (1938).

location surveying is not uniquely or to a dominant extent required to be performed by an A-E firm and the service must be procured competitively. Timberland-McCullough, Inc., B-208086, September 24, 1982, 82-2 CPD 273.

Between these clear cases the statutory requirement to utilize non-competitive procedures to procure A-E services³ becomes difficult to apply, resulting in our continuing attempt, through the bid protest process, to draw fine distinctions and to provide guidelines to the agencies as to the application of the Brooks Act to particular contracts. Of necessity, these determinations are based on the nature and circumstances of the work to be done and the needs of the contracting agency. Such determinations are the responsibility of the contracting agency, not our Office and, therefore, we have recognized broad discretion on the part of the agency in making such determinations. See Association of Soil and Foundation Engineers, B-204634, February 2, 1982, 82-1 CPD 77. We think that under the circumstances the proper role of this Office in these cases is to defer to the judgment of the agency unless the agency's conclusions are so egregious as to demonstrate a clear intent either to circumvent the Act or to employ the noncompetitive procedures enunciated by the Act to secure services that should properly be solicited by competitive means.

Although ASFE vehemently disagrees with Interior on both contracts, the record does not establish that Interior's conclusions are so erroneous so as to warrant a conclusion that it intended to circumvent the Brooks Act. We affirm our initial decision concerning solicitation No. KS120136 and deny the protest on solicitation No. FWS-6-82-046.


for Comptroller General
of the United States

³The Act defines A-E services only as those professional services of an architectural and engineering nature as well as those incidental services that members of these professions and those in their employ may logically or justifiably perform. 40 U.S.C. 541 (3).